No. 3–10–0530

Opinion filed June 3, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

AUTO OWNERS INSURANCE COMPANY, a/s/o John Ellis,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois
Plaintiff-Appellant,	)	No. 09-L-751
v.	)	
THOMAS W. CALLAGHAN,	)	Honorable Michael J. Powers,
Defendant-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE CARTER delivered the judgment of the court, with opinion.
Justice O'Brien concurred in the judgment and opinion.
Justice Holdridge dissented in the judgment.

OPINION

Plaintiff, Auto Owners Insurance Company, brought suit against defendant, Thomas Callaghan, to recover damages for a fire to a residence owned by its insured, John Ellis. The residence had been rented to defendant. Defendant filed a motion under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)) to dismiss the first amended complaint, which the trial court granted. Plaintiff appeals. We affirm the trial court's ruling.

FACTS

John Ellis owned a single-family home in Will County, Illinois, located at 677 East North Street in Manhattan. The home was rented for $1,350 per month to defendant, pursuant to a written

lease agreement.[1] The lease agreement, which was attached to plaintiff's first amended complaint, was a simple one-page document containing only three provisions. Of particular relevance to this appeal was the third provision, which read as follows:

> "3. SECURITY DEPOSIT. At the time of execution of this Rental Agreement, Tenant shall pay to Landlord in trust the sum of $2,500.00 to be held as a non-interest bearing security deposit to pay for any damages which Tenant, their guests or invitees may inflict upon the dwelling unit. Tenant[']s liability is not limited to the amount of the security deposit. *** Upon proper expiration of this lease Tenant will turn over full possession of the premises to the Landlord and return all keys. Tenant will return entire home/apartment including stove, refrigerator, disposal, bathroom, closets, cabinets, walls, tile, floors, fixtures, windows, blinds, doors and all carpeting in the same clean condition as when received. All carpeting to be professionally cleaned at the end of the lease and a paid receipt shall be furnished to the Landlord. The Tenant will not drive nails or other devi[c]es into the walls or woodwork. We recommend heavy straight pins but all must be removed and any patching, repair and painting will be the responsibility of the Tenant. In the event that Tenant does not comply to Landlord's satisfaction, Tenant authorizes Landlord to perform necessary work and bill the Tenant and the same shall be secured as

[1]The lease agreement expired on October 31, 2004. However, the first amended complaint alleged that Ellis and defendant orally agreed to continue the lease agreement on a month-to-month basis, including the terms of the original signed lease, and that defendant continued to make the required monthly rental payment.

additional rent and shall be deducted from security deposit."

On April 28, 2007, the home in question caught on fire and sustained extensive damage. Ellis had a fire insurance policy on the home through plaintiff and was paid $258,500 for the damage.[2] In September of 2009, plaintiff brought suit against defendant under a theory of subrogation. In the first amended complaint, plaintiff alleged that defendant had negligently caused the fire that damaged the home. Defendant filed a section 2-615 motion to dismiss the first amended complaint.

A hearing was held on the motion. After listening to the arguments of the attorneys, the trial court took the matter under advisement. The trial court subsequently entered a written order granting defendant's motion to dismiss. Plaintiff appealed.

ANALYSIS

On appeal, plaintiff argues that the trial court erred in granting defendant's section 2-615 motion to dismiss the first amended complaint for damages. Plaintiff asserts that the lease agreement clearly indicates that the parties intended that defendant would be liable for any fire damage to the premises. Plaintiff asserts further that defendant was not entitled to the status of a coinsured on the landlord's fire insurance policy, based solely upon defendant's mere payment of rent. Defendant disagrees with plaintiff's assertions and argues that the trial court's ruling was proper and should be affirmed.

A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based upon defects that are apparent on the face of the complaint. *Board of Directors of Bloomfield Club*

[2]It is unclear from the first amended complaint whether the money was paid to Ellis directly or on Ellis's behalf to repair the damages.

Recreation Ass'n v. Hoffman Group, Inc., 186 Ill. 2d 419, 423 (1999). In determining whether a complaint is legally sufficient, a court must accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). "The critical inquiry in deciding upon a section 2-615 motion to dismiss is whether the allegations of the complaint, when considered in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Bloomfield*, 186 Ill. 2d at 424. A cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that the plaintiff cannot prove any set of facts that will entitle the plaintiff to relief. *Bloomfield*, 186 Ill. 2d at 424. In reviewing a trial court's ruling on a section 2-615 motion to dismiss, the appellate court applies a *de novo* standard of review. *Bloomfield*, 186 Ill. 2d at 424.

The question of whether a tenant may be held liable for fire damage to the leased premises was addressed by the supreme court in *Dix Mutual Insurance Co. v. LaFramboise*, 149 Ill. 2d 314 (1992) (*Dix*). In that case, the supreme court stated that "[a]lthough a tenant is generally liable for fire damage caused to the leased premises by his negligence, if the parties intended to exculpate the tenant from negligently caused fire damage, their intent will be enforced." *Dix*, 149 Ill. 2d at 319-20. To determine if the parties intended such a result, the lease agreement between the landlord and the tenant must be interpreted as a whole so as to give effect to the intent of the parties. *Dix*, 149 Ill. 2d at 320. Despite stating a general rule of tenant liability, the supreme court went on in *Dix* to find that under the circumstances of that case, the tenant was not liable for the fire damage to the leased premises. See *Dix*, 149 Ill. 2d at 320-23. In so doing, the supreme court noted that the tenant had obtained the status of a coinsured by his payment of rent, which was presumably used by the landlord to purchase fire insurance. See *Dix*, 149 Ill. 2d at 322-23. The supreme court commented that to

rule otherwise would create an undesirable situation in which both the landlord and the tenant would be required to purchase fire insurance on the premises. See *Dix*, 149 Ill. 2d at 322. The supreme court's ruling in that case was consistent with prior rulings of the supreme court on similar issues. See *Cerny-Pickas & Co. v. C.R. Jahn Co.*, 7 Ill. 2d 393, 396-99 (1955); *Stein v. Yarnall-Todd Chevrolet, Inc.*, 41 Ill. 2d 32, 33-40 (1968).

Applying the holding from *Dix*, courts in other cases have routinely held that a tenant is not liable for fire damage to the leased premises, unless the terms of the lease, construed as whole, clearly indicate that the parties intended for the tenant to be liable for such damage. See, *e.g.*, *American National Bank & Trust Co. v. Edgeworth*, 249 Ill. App. 3d 52, 53-56 (1993); *Towne Realty, Inc. v. Shaffer*, 331 Ill. App. 3d 531, 536-42 (2002); *Cincinnati Insurance Co. v. DuPlessis*, 364 Ill. App. 3d 984, 985-87 (2006). Courts have also held that by the payment of rent, a tenant obtains the status of a coinsured of the landlord as to a fire insurance policy and cannot be sued for fire damage by either the landlord or by the landlord's insurer. See, *e.g.*, *Edgeworth*, 249 Ill. App. 3d at 54-56; *Shaffer*, 331 Ill. App. 3d at 540; *DuPlessis*, 364 Ill. App. 3d at 986-87.

Applying the law as noted above to the facts of the present case, it is clear that plaintiff cannot recover against defendant for the fire damage to the leased premises. See *Dix*, 149 Ill. 2d at 320-23; *Cerny-Pickas & Co.*, 7 Ill. 2d at 396-99; *Stein*, 41 Ill. 2d at 33-40; *Edgeworth*, 249 Ill. App. 3d at 53-56; *Shaffer*, 331 Ill. App. 3d at 536-42; *DuPlessis*, 364 Ill. App. 3d at 985-87. The lease agreement in question was a simple one-page document that contained only three provisions, none of which imposed liability upon defendant for fire damage. Although plaintiff tries to assert on appeal that the security deposit provision demonstrates that the parties intended defendant to be liable for fire damage, no such intent can be gleaned from the document itself. Rather, the document

merely places liability on the tenant to return the property in the same clean condition that he received it in initially. That conclusion is further bolstered by the fact that the landlord himself had obtained insurance that obviously covered the premises in case of a fire. In addition, as in the cases noted above, by the payment of rent, the instant defendant obtained the status of a coinsured as to the fire insurance policy and could not be sued for fire damage by either the landlord or by the landlord's insurer. See *Dix*, 149 Ill. 2d at 322-23; *Cerny-Pickas & Co.*, 7 Ill. 2d at 398-99; *Stein*, 41 Ill. 2d at 33-40; *Edgeworth*, 249 Ill. App. 3d at 54-56; *Shaffer*, 331 Ill. App. 3d at 540; *DuPlessis*, 364 Ill. App. 3d at 986-87.

Under the circumstances of this case and the present state of the law in this area, it is clearly apparent that there is no set of facts that plaintiff could prove that would entitle plaintiff to relief. The trial court, therefore, properly granted defendant's motion to dismiss plaintiff's first amended complaint for damages. See *Bloomfield*, 186 Ill. 2d at 424.

For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

Affirmed.

JUSTICE HOLDRIDGE, dissenting:

I respectfully dissent. As the majority and both of the parties recognize, the supreme court's ruling in *Dix* controls the outcome in this case. In *Dix*, the landlord's insurer alleged that the tenant negligently caused a fire which damaged the leased premises. The insurer paid the landlord for the loss and then filed a subrogation action against the tenant. The lease provided that the landlord was not responsible for damage to the tenant's personal property in case of fire. *Dix*, 149 Ill. 2d at 321. However, the lease failed to expressly address who would be liable for fire damage to the leased

premises.

The *Dix* court began its analysis by reaffirming the traditional common law rule that "a tenant is generally liable for fire damage caused to the leased premises by his negligence" unless the lease, when construed "as a whole," reveals that the parties "intended to exculpate the tenant" from this responsibility. *Dix*, 149 Ill. 2d at 319-20.[3] The court then construed the parties' lease as a whole in an effort to discern the parties' intent. The lease in *Dix* provided that the tenant would assume its own risk for its personal property and that the landlord would " 'not be responsible for fire, wind or water damage.' " *Dix*, 149 Ill. 2d at 321. The court "[found] it significant that the parties, who obviously considered the possibility of fire, expressly provided for the tenant's personal property but failed to do so with respect to the leased premises." *Dix*, 149 Ill. 2d at 322. The court took this as an indication that "the parties intended for each to be responsible for his own property." *Dix*, 149 Ill. 2d at 322. Thus, although the lease did not expressly relieve the tenant from liability for negligent fire damage, the court concluded that the lease, when read as a whole, expressed the parties' intent that "the tenant

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[3] This long-standing common law rule was acknowledged and applied in several Illinois appellate court decisions prior to *Dix*. See, *e.g.*, *Fire Insurance Exchange v. Geekie*, 179 Ill. App. 3d 679, 682 (1989) ("The established law in Illinois is that in the absence of an express agreement to the contrary, a tenant is liable for damages to the leased premises resulting from his failure to exercise due care."); *Ford v. Jennings*, 70 Ill. App. 3d 219, 221 (1979) ("[a]t common law a tenant is responsible for damage to leased premises resulting from his own negligence"); *First National Bank of Elgin v. G.M.P., Inc.*, 148 Ill. App. 3d 826, 828-30 (1986) (applying the common law rule and holding that a commercial tenant was liable for fire damage caused by its negligence where the lease did not relieve the tenant of liability for such damage).

was not to be liable for any fire damage to the premises and that the landlord would look solely to the insurance as compensation for any fire damage to the premises." *Dix*, 149 Ill. 2d at 322. The court also found that, "[u]nder the particular facts of this case, the tenant, by payment of rent, has contributed to the payment of the insurance premium, thereby gaining the status of co-insured under the insurance policy." *Dix*, 149 Ill. 2d at 323. For all these reasons, the court held that the insurance company did not have subrogation rights against the tenant. *Dix*, 149 Ill. 2d at 323.

I believe that the circuit court misapplied *Dix* in this case and erred in granting the defendant's motion to dismiss. Unlike the lease in *Dix*, there is nothing in the lease at issue here suggesting that the parties intended to absolve the defendant from liability for fire damage to the leased premises caused by the defendant's negligence. The lease contains no provisions addressing potential fire damage or allocating the responsibility for such damage. Nor does it require the landlord to procure fire insurance for the premises or suggest (either explicitly or implicitly) that the landlord would purchase any fire insurance. Thus, unlike the lease in *Dix*, the lease at issue here does not reveal that the parties "considered the possibility of fire" damage.

The only provision in the lease that addresses the parties' responsibility for any type of damage to the premises is the security deposit provision, which states that the tenant's security deposit will "pay for *any damages* which tenant, their [*sic*] guests or invitees may inflict upon the dwelling unit" and that the [t]*enants [sic] liability is not limited to the amount of the security deposit.*" (Emphasis added.) It also provides that the "[t]enant will return [the] entire home/apartment including stove, refrigerator, disposal, bathroom, closets, cabinets, walls, tile, floors, fixtures, windows, blinds, doors and all carpeting in the same clean condition as when received." These provisions suggest that the parties intended the tenant to be liable for *all* damages inflicted upon the leased premises by the tenant, his guests, and his invitees without exception. No other provision in the lease qualifies this provision

or expresses any contrary intention. Thus, unlike the lease in *Dix*, the lease at issue here, when construed as a whole, does not reflect that the parties intended to relieve the tenant from liability for fire damages to the premises caused by the defendant.

Construing similar lease agreements, our appellate court reached the same conclusion in *Nelson v. Greenberg*, 237 Ill. App. 3d 125, 128-29 (1992). In *Nelson*, a landlord's insurer brought suit against a tenant claiming a right of subrogation for fire damage to the leased premises that was allegedly caused by the tenant's negligence. The trial court granted summary judgment in favor of the tenant. The appellate court reversed. Applying "the guidelines set forth in *Dix*," the appellate court construed the leases at issue as a whole. *Nelson*, 237 Ill. App. 3d at 128-29. The court noted that the leases "ma[de] *no* express provision regarding liability for fire damage or procurement of insurance by either party." (Emphasis in original.) *Nelson*, 237 Ill. App. 3d at 128. Moreover, the leases provided that the tenant would be responsible for " 'all breakage.' " *Nelson*, 237 Ill. App. 3d at 128. Finding no "language in the lease[s] relating to fire insurance" and "reading the lease agreement[s] as a whole," the court found that the parties intended that the tenant be liable for losses resulting from the tenant's negligence. *Nelson*, 237 Ill. App. 3d at 128-29. Accordingly, the appellate court reversed the trial court's grant of summary judgment for the tenant and allowed the insurer's subrogation action to proceed. *Nelson*, 237 Ill. App. 3d at 128-29.

The appellate court's holding in *Nelson* is fully consistent with—and, in fact, is compelled by—*Dix*. In *Dix,* the supreme court reaffirmed the traditional common law rule that "a tenant is generally liable for fire damage caused to the leased premises by his negligence" unless the lease, when construed as a whole, reveals that the parties "intended to exculpate the tenant" from this responsibility. *Dix*, 149 Ill. 2d at 319-20. Thus, where there is nothing in a lease suggesting such an intent—such as a provision implying that the landlord assumes responsibility for fire damage to the

premises or a provision requiring the landlord to procure fire insurance on the property—the default common law rule controls, and the tenant remains liable for negligent fire damage. Such is the case here. Like the leases in *Nelson*, the lease at issue here contained no provision addressing liability for fire damage or the procurement of fire insurance by either party. Moreover, the only provisions in the lease that allocate responsibility for damages to the premises require the tenant to pay for "any damages" he inflicted upon the premises. Thus, the lease cannot be read as exculpating the defendant from liability for fire damage caused by his negligence. See, *e.g.*, *Nelson*, 237 Ill. App. 3d at 128-29. Under the traditional common law rule, the defendant remains liable for such negligence. See, *e.g.*, *Dix*, 149 Ill. 2d at 319-20; *Geekie*, 179 Ill. App. 3d at 682; *Nelson*, 237 Ill. App. 3d at 128-29.

Although the majority acknowledges the traditional common law rule (see slip op. at 4), it turns the common law rule on its head by concluding that a tenant "is not liable for fire damage to the leased premises, unless the terms of the lease, construed as a whole, clearly indicate that the parties intended for the tenant to be liable for such damage." Slip op. at 5. As noted, however, the traditional common law rule acknowledged and applied by the supreme court in *Dix* provides just the opposite, *i.e.*, that a tenant is liable for damages caused by his negligence unless the lease expresses a contrary intent. *Dix* did not abrogate or modify this rule. To the contrary, it expressly acknowledged the rule and reaffirmed it.

The majority also reads *Di*x as establishing that a tenant is a coinsured under the landlord's fire insurance policy as a matter of law—and therefore may not be sued by the insurer in a subrogation action—because he paid rent to the landlord. Slip op. at 6. I disagree. In *Dix*, the supreme court held that the tenant had "gain[ed] the status of co-insured under the [landlord's] insurance policy" because he "contributed to the payment of the insurance premium" through the payment of rent. *Dix*, 149 Ill. 2d at 323. However, the court took care to note that it had reached this conclusion "[u]nder the

particular facts of this case," which presumably included the fact that the lease expressed the parties' intent to relieve the tenant of liability for fire damage. The court did not purport to establish a general rule barring insurer subrogation actions against tenants as a matter of law. Rather, it merely found that where the parties to a lease express their intention that the landlord will be responsible for any fire damage to the premises, the tenant should be treated as a coinsured under the landlord's fire insurance policy. As noted, no such intent was expressed in the lease at issue here.

Moreover, reading *Dix* as establishing a blanket rule barring insurer subrogation claims against tenants absent contrary language in the lease would render the supreme court's opinion in *Dix* internally inconsistent. As noted above, the *Dix* court acknowledged and reaffirmed the traditional common law rule holding tenants responsible for damages to the leased premises caused by their negligence, and it confirmed that this default rule governs unless the lease as a whole expresses a contrary intent. *Dix*, 149 Ill. 2d at 319. And, *Dix* ruled that "[t]here is no general rule which can be laid down to determine whether a right of subrogation exists since this right depends upon the equities of each particular case." *Dix*, 149 Ill. 2d at 319. A default rule barring insurer subrogation actions against tenants absent contrary language in the lease would conflict with each of these rulings.[4]

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[4] I recognize that the concurring and dissenting justices in *Dix* read the majority opinion as establishing a rule treating tenants as coinsureds under the landlord's insurance policy (and therefore barring insurer subrogation actions against tenants) unless the lease expressly indicates otherwise. See *Dix*, 149 Ill. 2d at 324-26 (Freeman, J., concurring), 327-30 (Heiple, J., dissenting). As I noted above, however, such a reading renders the majority opinion in *Dix* self-contradictory and incoherent. Moreover, as the concurring and dissenting Justices acknowledged, their reading of the majority opinion would "eviscerate" the common law rule.

The majority relies on several other supreme court and appellate court decisions which held that a landlord's insurer could not maintain a subrogation action against a tenant for fire damage allegedly caused by the tenant's negligence. See slip op. at 5-6. Each of the supreme court decisions and all but one of the appellate court decisions cited by the defendant involved leases which explicitly or implicitly indicated that the landlord would obtain fire insurance on the premises. See *Cerny-Pickas & Co. v. C.R. Jahn Co.*, 7 Ill. 2d 393, 398 (1955); *Stein v. Yarnall-Todd Chevrolet, Inc.*, 41 Ill. 2d 32, 36 (1968); *Towne Realty, Inc. v. Shaffer*, 331 Ill. App. 3d 531, 541 (2002); *American National Bank & Trust Co. v. Edgeworth*, 249 Ill. App. 3d 52, 53 (1993).[5] Under these circumstances, the courts in

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My reading of *Dix*, by contrast, preserves the common law rule and harmonizes all portions of the majority opinion. In addition, the *Dix* majority noted that its opinion was based on its construction of the parties' lease as a whole (*Dix*, 149 Ill. 2d at 320-22), and it expressly stated that its conclusion that the tenant was a coinsured under the landlord's insurance policy was based on the "particular facts" of that case. *Dix*, 149 Ill. 2d at 323. Accordingly, the majority opinion in *Dix* should not be read as establishing a general default rule barring insurer subrogation actions against tenants. For all these reasons, I read *Dix* as the *Nelson* court read it, and I respectfully disagree with the concurring and dissenting opinions in *Dix*.

[5] The sole exception is *Cincinnati Insurance Co. v. DuPlessis*, 364 Ill. App. 3d 984 (2006). In that case, the court held that a tenant could not be found liable for fire damages to the leased premises allegedly caused by the tenant's negligence even though the oral lease at issue did not address liability for fire damage or the procurement of fire insurance. The court concluded that *Dix* had "turned the [traditional common law] rule on its head" by establishing a presumption that the parties do not intend a tenant to be liable unless the lease contains an

these cases reasonably concluded that the parties "intended that the [landlord] should look solely to insurance as compensation for damage caused by any kind of fire," and that subrogation against the tenant would therefore be inappropriate. *Cerny-Pickas & Co.*, 7 Ill. 2d at 398; see also *Stein*, 41 Ill. 2d at 37; *Shaffer*, 331 Ill. App. 3d at 540; *Edgeworth*, 249 Ill. App. 3d at 56. As noted, however, nothing in the lease at issue here explicitly or implicitly requires the landlord to procure fire insurance or any other type of insurance on the premises. Moreover, the only provisions in the lease which address the parties' liability for damage to the premises indicate that the defendant shall be liable for any damage he causes to the property. The cases cited by the majority are therefore distinguishable. Unlike the parties in those cases, the parties here did not expressly intend for the landlord to assume and insure against the risk of fire damage to the premises. Thus, unlike the tenants in those cases, the defendant here did not "contribute[] to the payment of [a fire] insurance premium" and thereby become a coinsured on the landlord's fire insurance policy merely by the payment of rent. *Dix*, 149 Ill. 2d at 323; see also *Shaffer*, 331 Ill. App. 3d at 540. Accordingly, the plaintiff's subrogation claim is not barred as a matter of law.

Moreover, allowing the plaintiff's claim to proceed would promote equity. As noted above,

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express statement to the contrary. *DuPlessis*, 364 Ill. App. 3d at 986. The court saw this supposed rule as the culmination of a 40-year "trend toward tenant non-liability" that the supreme court began in *Cerny-Pickas*. *DuPlessis*, 364 Ill. App. 3d at 986. The *DuPlessis* court also construed *Dix* as holding that "where the landlord purchases insurance, the tenant becomes a coinsured with the landlord and, therefore, the insurer may not sue the tenant for subrogation." *DuPlessis*, 364 Ill. App. 3d at 987. For the reasons stated above, I find *DuPlessis*'s reading of *Dix* unsupportable, and I respectfully disagree with the court's holding in that case.

"[t]he right of subrogation is an equitable right and remedy which rests on the principle that substantial justice should be attained by placing ultimate responsibility for the loss upon the one against whom in good conscience it ought to fall." *Dix*, 149 Ill. 2d at 319. Because the parties did not agree to release the defendant from liability for fire damages caused by his negligence, allowing the plaintiff's claim to proceed would "satisf[y] equitable concerns by placing the burden of the loss where it ought to be—on the negligent party." *Geekie*, 179 Ill. App.
3d at 682. Moreover, it serves the public interest if negligent actors are held responsible for the damage or injury they cause. *Dix*, 149 Ill. 2d at 330 (Heiple, J., dissenting).

For the reasons set forth above, I believe that the circuit court erred in granting the defendant's motion to dismiss the plaintiff's first amended complaint. I would therefore reverse and remand for further proceedings.